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No. 91-1831

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS W. CARROLL, ROBERT J. CARROLL, MICHAEL E. McCHESNEY, EMANUEL J. PANOS, EDWARD J. PRIOLA, CRAIG J. RUCKER, ROBERT T. SCHMIDLIN, BETH TURKOVIC GARFUNKEL, CHRISTINE McCLELLAN, CHRISTOPHER SANDOR and SUSANNE ZIEGLER,

Petitioners,

vs.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York,

Respondents.

(For Full Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners,

vs.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, GEORGE L. COLLINS, JR., D. CLINTON DOMINICK, JUDITH LASHER DUKEN, ARNOLD B. GARDNER, GURSTON D. GOLDIN, JOHN L.S. HOLLOMAN, JR., NAN JOHNSON, EVERETTE JOSEPH, JUDITH DAVIDSON MOYERS, EDWARD V. MELE, VICTOR MARRERO, ROSEMARY SALOMONE, EDGAR A. SANDMAN, THOMAS VAN ARSDALE, and DARWIN R. WALES in their respective capacities as trustees of the State University of New York, JEROME KOMISAR, in his capacity as Acting Chancellor of the State University of New York, VINCENT O'LEARY, CLIFFORD D. CLARK, and ALICE CHANDLER, in his or her capacity as President and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

QUESTIONS PRESENTED

1. Does the State University of New York at Albany ("SUNY Albany") violate the First Amendment to the United States Constitution by applying a content-neutral, student activity fee regulation to fund numerous and diverse student groups, when one of the student groups, which is funded because of its educational value, engages in speech with which some students disagree?

2. Was the Court of Appeals correct in finding that any minimal intrusion on First Amendment rights is more than justified by SUNY Albany's interests in enriching students' educational opportunities and stimulating energetic campus debate, provided that the student groups at SUNY Albany use the student activity fees for the benefit of SUNY Albany students?

PARTIES TO THE PROCEEDING

The petitioners, who were plaintiffs in the district court and appellants in the Court of Appeals are: Thomas W. Carroll, Robert J. Carroll, Michael E. McChesney, Emanuel J. Panos, Edward J. Priola, Craig J. Rucker, Robert T. Schmidlin, Beth Turkovic Garfunkel, Christine McClellan, Christopher Sandor and Susanne Ziegler.[1]

The respondents, who were defendants in the district court and appellees in the Court of Appeals are: Donald M. Blinken, in his capacity as Chairman of the Board of Trustees of the State University of New York, George L. Collins, Jr., D. Clinton Dominick, Judith Lasher Duken, Arnold B. Gardner, Gurston D. Goldin, John L.S. Holloman, Jr., Nan Johnson, Everette Joseph, Judith Davidson Moyers, Edward V. Mele, Victor Marrero, Rosemary Salomone, Edgar A. Sandman, Thomas Van Arsdale, and Darwin R. Wales, in their respective capacities as trustees of the State University of New York, Jerome Komisar, in his capacity as Acting Chancellor of the State University of New York, Vincent O'Leary, Clifford D. Clark, and Alice Chandler, in his or her capacity as President and chief administrative officer of, respectively, the State University of New York at Albany, the State University of New York at Binghamton, and the State

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1. This Court does not have jurisdiction over the claims of any of the petitioners, except Thomas W. Carroll ("Carroll"), because the Notice of Appeal (the "Notice") only named Carroll in either the caption or the text of the Notice. Carroll's injunctive relief claims had been dismissed earlier in the case by the district court as moot, which dismissal was never appealed. Thus, the Notice is defective as to all other petitioners, including the only plaintiffs with injunctive relief claims, because it fails to comply with the jurisdictional requirements of Fed. R. App. P. 3(c). *See, e.g., Torres v. Oakland Scavengers Co.*, 487 U.S. 312, 318 (1988).

University of New York at New Paltz, and New York Public Interest Research Group, Inc.[2]

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2. New York Public Interest Research Group, Inc. has no parent company and no subsidiaries.

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No. 91-1831

In The

Supreme Court of the United States

October Term, 1991

THOMAS W. CARROLL, *et al.*,

Petitioners,

v.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, *et al.* and NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENT NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is an action by eleven former and current students ("plaintiffs" or "petitioners") who challenge as unconstitutional the allocation to New York Public Interest Research Group,

Inc. ("NYPIRG") of a portion of the mandatory student activity fees paid by all students at three campuses of the State University of New York ("SUNY" or the "University").[3] Plaintiffs contend that the allocation to NYPIRG violates their First Amendment rights because they disagree with some of NYPIRG's views and activities.

Pursuant to New York State Education Law, Section 355, the SUNY Board of Trustees adopted a regulation as amended in 1976, 8 N.Y.C.R.R. § 302.14 (the "Regulation"), which governs the imposition, collection and allocation of the student activity fee at SUNY, including the SUNY Albany campus. The Regulation establishes a mechanism through which a broad range of extracurricular activities enhancing the educational, cultural, social and recreational experiences of the SUNY student population can be funded (App. 5D).[4] Under the Regulation, all allocations which are included in the student activity fee budget must benefit the campus community and be consistent with one of eleven criteria (App. 5C).

The Regulation is content-neutral (App. 18A), and plaintiffs do not claim otherwise. The student activity fee at SUNY Albany is used to fund approximately 100 student groups on a non-discriminatory basis. Through this funding SUNY Albany has created a diverse forum for "uninhibited and vigorous discussion on matters of campus and public concern"

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3. The complaint sought a permanent injunction, declaratory judgment and damages. Prior to trial, the district court dismissed the injunctive relief claims of all plaintiffs who had graduated from SUNY for lack of standing and bifurcated the trial so that the remaining injunctive relief claims, those as to SUNY Albany, would be tried first.

4. The decision of the district court is reproduced in Appendix D. Page references are to the Appendix.

(App. 21A). The creation of a forum on campus is part of the University's educational mission (App. 21A-22A, 10D).

Any student group is eligible for funding if the SUNY Albany Student Association determines, with required approval by SUNY Albany's President, that the student group meets the criteria set forth in the Regulation (App. 5A). SUNY Albany's funding of NYPIRG complies with the Regulation because NYPIRG provides substantial educational benefits to students at SUNY Albany (App. 20A-21A, 9D), and thus satisfies the sixth criterion of the Regulation as a recognized student organization whose "purpose and activities . . . are of [an] educational, cultural, recreational or social nature" (App. 5A). Among other things, NYPIRG's educational value includes teaching students concrete skills, such as research, public speaking, writing, negotiation, organization and advocacy and providing a "hands-on civics exercise" (App. 20A-21A; *see* 8D). In addition, SUNY Albany awards academic credit for students who participate in internships with NYPIRG (App. 8A).

NYPIRG is a student run, not-for-profit organization, whose board of directors (the "Board") is composed solely of students elected annually by all of the students at each of the 17 schools in New York State with a NYPIRG chapter (App. 6A, 6D). Each of those schools has at least one representative on the Board. The Board approves project proposals and annually selects the projects and issues on which NYPIRG will work both statewide and on local campus chapters (App. 7D). Any student may submit a proposal to NYPIRG's Board and, thus, it is the students who choose the projects and issues NYPIRG works on (App. 7D).

NYPIRG's paid staff, which is under the control of the student Board, provides students with experienced supervision and direct skills training, such as workshops on writing and public speaking. Contrary to plaintiffs' assertions, most of the

paid staff of approximately 65 individuals statewide are involved in supervising and teaching students who are active in NYPIRG either on campus or in NYPIRG's legislative internship program or are involved in administering NYPIRG's New York office in order to ensure that the NYPIRG campus chapters receive the benefits of being part of a statewide organization[5] (App. 8D, 14D). The testimony at trial was uncontradicted that NYPIRG employs no full-time paid lobbyists and that only a small number of staff members ever lobby, and then only rarely.[6] NYPIRG hires a full-time project coordinator at each campus chapter, including SUNY Albany, to assist students in developing research, writing, and public speaking skills. NYPIRG hires executive staff responsible for the supervision and training of the full-time project coordinators.

NYPIRG's focus is, and always has been, the campuses and most of NYPIRG's activities take place there. NYPIRG's activities are non-partisan and NYPIRG does not endorse or support campaigns for elective office (App. 6D). The campus chapter at SUNY Albany organizes numerous speeches, debates, public forums and film/discussion events on a host of public issues. The work of NYPIRG's campus chapter at SUNY Albany has contributed to the diversity and breadth of views aired on the SUNY Albany campus.

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5. Although plaintiffs state that NYPIRG is the only funded student group which has its principal office off-campus, at least one other funded student group, Amnesty International, has its principal office off the SUNY Albany campus.

6. In any event, whether staff members lobby is irrelevant because to the extent NYPIRG expends funds on activities which do not involve SUNY Albany students, the Court of Appeals ruled in plaintiffs' favor that these funds may not come from SUNY Albany student fees (App. 24A-26A).

Despite plaintiffs' attempts to portray it otherwise, NYPIRG is not unique among funded organizations at SUNY Albany. First, NYPIRG is funded, as are all other student groups, only after both the SUNY Albany Student Association and the SUNY Albany President determine that it meets the criteria set forth in the Regulation. Further, NYPIRG is not the only group which is funded on a per capita basis, whose budget is not itemized or whose funding is subject to a separate advisory referendum.

During the relevant period, 1986-1989, the SUNY Albany Student Association approved an average allocation to NYPIRG of approximately $57,000 per year, out of a student activity fee budget of approximately one million dollars per year. This money is spent on the training students involved with NYPIRG at SUNY Albany receive and on the many activities and projects on which the students participate and work.[7]

Student activity fees make up 30 percent of NYPIRG's budget (App. 8D-9D). Thus, NYPIRG extensively supplements this funding from other sources and expends more on behalf of students enrolled at the campuses on which NYPIRG is located, including SUNY Albany, than the amount of NYPIRG's budget allocation from those campuses.

After a bench trial, the district court rejected plaintiffs' claims holding that plaintiffs had not established that their First Amendment rights had been infringed (App. 15D). The

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7. Petitioners attempt to portray NYPIRG as having limited participation by students at SUNY Albany (Petition for Writ of Certiorari ("petition") at 5 n.5). However, the testimony was undisputed that, in addition to the 40 students who run the campus chapter, many more, up to a couple of hundred, attend each NYPIRG meeting and each forum, debate and movie NYPIRG sponsors.

district court found as a fact that NYPIRG's activities do provide a substantial educational benefit to students at SUNY Albany and concluded that SUNY Albany's exercise of academic freedom was itself protected by the First Amendment (App. 8D-10D). The district court found that "the activity fee funds a forum created for the purpose of fostering the expression of diverse views through a wide range of groups" and "is being used by SUNY Albany precisely to further the University's core educational purpose of maintaining a broad extracurricular program and an open forum for discussion and debate" (App. 13D-14D). Further, the district court held that, because plaintiffs do not pay any fee directly to NYPIRG and because the fee they do pay is used to fund a large number of diverse groups, plaintiffs had not established their claims of compelled speech or association (App. 12D).

The Court of Appeals held that plaintiffs' First Amendment right against compelled speech suffers when NYPIRG uses student funds (App. 15A), but that the infringement is justified by various educational interests of the University (App. 23A). Specifically, the court noted SUNY Albany's substantial interest in promoting "a rich extracurricular life for its students," in teaching "specific, concrete skills -- research, speaking, writing, organization and advocacy," and in stimulating "uninhibited and vigorous discussion on matters of campus and public concern" (App. 19A-21A). Moreover, the court found that "these interests would be served less effectively absent the activity fee distribution regulation" (App. 23A).

However, the Court of Appeals further ruled that SUNY Albany's interests would not justify the use of SUNY Albany students' money for any NYPIRG expenditures that

were unrelated to benefiting SUNY Albany students[8] (App. 24A-26A). Consequently, the court remanded the case to the district court to fashion procedures "requiring NYPIRG to confirm in the Albany Student Association budgetary process that it spends at SUNY Albany the equivalent of Albany students' activity fee contribution" (App. 26A). The district court has not yet determined what procedures are required.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF ACADEMIC FREEDOM IN UPHOLDING THE STATE UNIVERSITY'S CONTENT-NEUTRAL STUDENT ACTIVITY FUNDING REGULATION

The petition's finespun arguments unwind because they misconceive one bedrock principle of First Amendment jurisprudence: academic freedom. Plaintiffs disagree with the factual findings of the courts below that NYPIRG has educational value to students and that SUNY Albany has educational policy reasons for permitting NYPIRG to be funded along with other groups. However, those findings,

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8. The Court of Appeals also held that the automatic membership provision of NYPIRG's by-laws, pursuant to which all students who paid the student activity fee were members of NYPIRG, served no substantial SUNY Albany interest and impermissibly infringed the students' right to be free from compelled association. Because this issue was decided by the Court of Appeals in plaintiffs' favor, it is not before this Court. Additionally, on April 11, 1992, in response to the Court of Appeals' decision, NYPIRG amended its by-laws to eliminate the automatic membership provision.

which are not challenged as clearly erroneous, significantly deflate plaintiffs' arguments that this case warrants this Court's granting of the petition.

Indeed, the petition is little more than a garden-variety objection to a student activity regulation. Plaintiffs' objection to NYPIRG's funding is indistinguishable from objections that each and every SUNY Albany student may have to one or another student group. Moreover, plaintiffs' theory invites the federal courts, rather than college administrators, to determine which student groups and activities are entitled to funding and which are not. Thus, plaintiffs seek relief which would threaten both to chill the free speech rights of students participating in student activities and to undermine the University's right to structure a diverse extracurricular program and an open forum for robust debate.

The unanimous opinion of the Court of Appeals upholds the Regulation by applying basic First Amendment principles that are not in doubt, while giving due deference to the educational judgments of SUNY Albany's administrators. Further, while the Court of Appeals eschewed intermeddling in university affairs, it did accord plaintiffs the narrowly circumscribed right to challenge the allocation of student activity fees to the extent the fees are alleged to be used for a purpose unrelated to benefiting students at SUNY Albany.

SUNY Albany exercised its educational judgment in deciding to permit funding of NYPIRG out of student activity fees. Accordingly, the Court of Appeals properly considered the long line of this Court's precedents which recognize the academic freedom of a university and the wide latitude that must be accorded to a university in pursuing its educational mission (App. 18A-19A). *See Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985) (deference to university required because of responsibility under First Amendment to safeguard academic freedom); *Regents of the*

Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (First Amendment guarantee of academic freedom leaves university free to make its own judgments as to education); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is a special concern of the First Amendment).

As the Court of Appeals also recognized, SUNY Albany's determination to foster extracurricular activities as part of its educational program is entitled to broad deference.[9] *See* App. 20A, *citing Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb. 1973), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). Academic freedom clearly extends to promoting education outside the confines of the classroom[10] (App. 20A). *See Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring) ("it is clear that the 'atmosphere' of a university includes such a critical aspect of campus life" as extracurricular activities).

Furthermore, college campuses are peculiarly the "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180

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9. Plaintiffs' educational claims are anachronistic and based on the narrow notion that the proper function of public education begins at the blackboard and ends at the classroom door. They reject the idea that a state university has any interest in promoting educational activities that are not listed in the course catalog. In fact, because the result of the activity funding is that plaintiffs pay for one group with which they disagree, they are willing to eliminate the funding of all student groups. *See* Petition at 20, 24.

10. While petitioners rely on *Board of Education v. Pico*, 457 U.S. 853 (1982) for the proposition that extracurricular activities are not within the same discretion of educators as are classroom activities, they ignore that in *Pico* the plaintiffs had conceded that if the decision to remove books from the school library was solely educational, instead of content based, the decision would have been permissible. *Id.* at 870-72.

(1972). The student activity fee creates a forum at SUNY Albany by funding nearly 100 diverse groups[11] (App. 21A, 10D). Determining which groups should be part of this forum and which provide educational benefits to the students are decisions "best left to administrators and trustees with expertise in designing college and university curriculum and extra-curricular activities" (App. 10D). *See Ewing*, 474 U.S. at 226; *Galda v. Bloustein*, 686 F.2d 159, 166 (3d Cir. 1982) ("*Galda I*") (noting that "[a]lthough many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment").

Finally, the establishment of the forum, which is accessible to any student group without governmental review of the content of the group's functions and activities, is itself subject to First Amendment protection (App. 18A, 10D). *See also Widmar*, 454 U.S. at 267-68, 277. Once a university creates an open forum, the Constitution forbids the university from enforcing discriminatory, content based exclusions. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Widmar*, 454 U.S. at 267-68. To deny funding to NYPIRG because certain students disagree with its views would effectively exclude NYPIRG from the forum and would stand the First Amendment on its head.

For all these reasons, the Court of Appeals properly weighed plaintiffs' right to be free from compelled speech

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11. The core purpose of the First Amendment is to foster the robust and unfettered exchange of ideas. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). This purpose is furthered by the creation of a forum at SUNY Albany through the funding of these diverse groups (App. 9D-10D).

against the First Amendment rights of SUNY Albany in academic freedom and of NYPIRG in non-discriminatory access to the University forum, and correctly concluded that the Regulation permitting the funding of NYPIRG at SUNY Albany is constitutional.

II.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS

In reviewing whether the allocation to NYPIRG of a portion of the mandatory student activity fees collected at SUNY Albany intruded on petitioners' First Amendment rights, the Court of Appeals applied *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Lehnert v. Ferris Faculty Ass'n*, _ U.S. _, 111 S. Ct. 1950 (1991).[12] The Court of Appeals found a First Amendment intrusion, but determined that it was justified by SUNY

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12. Respondent NYPIRG does not agree that *Abood* and its progeny should apply to this case both for the reasons stated in Point I above and because those precedents on their face do not apply where a university compels the payment of a student activity fee which it allocates to nearly 100 diverse student groups on a content-neutral basis in order to create a forum.

Albany's interests in enhancing the educational quality of the University.[13]

Plaintiffs suggest that in *Abood* and its progeny this Court required that the state demonstrate a compelling state interest in the regulations at issue, but that suggestion is mistaken. *See, e.g., Lehnert*, 111 S. Ct. at 1959; *Keller*, 496 U.S. at 13-14; *Abood*, 431 U.S. at 225, 232. This Court has not applied the compelling state interest standard to forced funding cases.

The Court of Appeals correctly followed this Court's prior decisions holding that where a regulation affecting speech is content-neutral, the state must show a substantial state interest which would be achieved less effectively absent the regulation.[14] *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 & n.6 (1989); *United States v. Albertini*, 472 U.S. 675, 687-89 (1985). A regulation is "content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (quoting *Clark v.*

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13. The points as to which the Court of Appeals found insufficient justification -- NYPIRG's spending which did not benefit SUNY Albany students and its automatic membership by-law provision -- were decided in petitioners' favor and are not before this Court.

14. The compelling state interest standard, urged on this Court by petitioners, is applied by this Court only where it finds a regulation of speech is content based, unlike the Regulation at issue here. *See, e.g., Burson v. Freeman*, _ U.S. _, 60 U.S.L.W. 4393, 4395 (U.S. May 26, 1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, _ U.S. _, 112 S. Ct. 501, 508-09 (1991). The least restrictive means test is similarly inappropriate for content-neutral regulations. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989).

Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis deleted). As the Court of Appeals found, the Regulation is content-neutral because it "does not grant or withhold funds based on the content of the recipient's speech" (App. 18A). Thus, the Court of Appeals properly determined that the funding of NYPIRG was constitutional if the state had a substantial interest which would be achieved less effectively absent the Regulation (App. 18A). This test is especially appropriate here where the Regulation seeks to expand speech and the University's own First Amendment interests are at stake.

The Court of Appeals found three substantial state interests which justified SUNY Albany's allocation of a portion of the student activity fee to NYPIRG. The first interest is the promotion of a rich extracurricular life for students at SUNY Albany (App. 19A). The Regulation is consistent with a "common vision of the university as more than the sum of classes in its course catalog" (App. 20A).

The second interest is SUNY Albany's interest in NYPIRG's educational value to SUNY Albany students who choose to participate in NYPIRG (App. 20A). NYPIRG's educational value includes both its teaching of specific concrete skills and its transmitting a sense of civic duty to students (App. 20A-21A).

The third, and in the Court of Appeals' view, the most important, interest advanced by SUNY Albany in funding NYPIRG and other groups pursuant to the Regulation is to "stimulate uninhibited and vigorous discussion on matters of campus and public concern" (App. 21A). The Court of Appeals found that SUNY Albany's interest in "creat[ing] a forum for the expression of diverse views" is itself a concern of the First Amendment and that the funding scheme was part of the "university fulfilling its traditional mission in a free

society" (App. 21A-22A). These interests, especially when combined, are clearly substantial.[15]

The Court of Appeals then found that SUNY Albany's substantial interests would be less effectively achieved absent the Regulation (App. 23A-24A). The Court of Appeals found, for example, that "an alternative funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate" (App. 24A). Thus, the allocation of a portion of the student activity fee at SUNY Albany to NYPIRG is constitutional.

Further, the Court of Appeals faithfully applied the germaneness doctrine from the *Lehnert-Keller-Abood* line of cases to determine whether the petitioners could be charged for all of NYPIRG's expenditures (App. 24A). It determined that there was a sufficient nexus between the allocation of the fee to NYPIRG and SUNY Albany's educational interests, except to the extent that NYPIRG did not spend the allocation from SUNY Albany to benefit the students at SUNY Albany.[16] Thus, the Court of Appeals applied the germaneness test in a manner consistent with the prior decisions of this Court.

Finally, plaintiffs argue that the Court of Appeals decision is inconsistent with the Third Circuit's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) ("*Galda*"). However, the facts in *Galda* were entirely different. Most notably, New Jersey PIRG was

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15. Indeed, these interests would satisfy the compelling state interest standard, if it were applicable here. *See supra*, footnote 14.

16. Plaintiffs' attack on the Court of Appeals' method for ensuring germaneness is premature, since the precise procedure will be determined by the district court on remand (App. 25A-26A).

funded with a separate fee and not as part of the forum created by Rutgers' general student activity fee. In contrast, NYPIRG is funded out of the general student activity fee as part of the forum.[17] This distinction is critical as the Third Circuit explicitly declined to address the question which faced the Court of Appeals here -- "whether an organization with [New Jersey] PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views." *Galda*, 772 F.2d at 1064. In fact, the Third Circuit acknowledged, as the Second Circuit actually found here, that for groups funded by general activities fees, the university's role of presenting a variety of ideas might be a sufficient reason for some infringement of First Amendment rights. *Id.* at 1067. Thus, the factual differences between the two cases, which resulted in different outcomes, do not amount to a conflict in the circuits and do not provide a reason for this Court to grant a writ of certiorari.

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17. The plaintiffs try to blur the factual differences between *Galda* and this case by arguing that NYPIRG's funding is different from the funding of other student groups at SUNY Albany and, thus, more like the separate fee in *Galda*. This argument fails because NYPIRG's funding is not dissimilar to the funding of other student groups at SUNY Albany (*see*, *supra*, p. 5).

CONCLUSION

The allocation of a portion of the mandatory student activity fees to NYPIRG at SUNY Albany is constitutional because, as the Court of Appeals correctly found, the Regulation is content-neutral and the funding serves substantial state interests which would be achieved less effectively absent the Regulation. For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be denied.

June 15, 1992

Respectfully submitted,

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APPENDIX

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS W. CARROLL, et. al.,	:	
Plaintiffs,	:	OPINION AND ORDER
- against -	:	83 Civ. 1272 (RO)
DONALD M. BLINKEN, et. al.,	:	
Defendants.	:	

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OWEN, District Judge

This action was tried before me without a jury over six days in October and November 1989. Plaintiff, a student at the New York State University at Albany,[1] attacks as unconstitutional the allocation to the New York Public Interest Research Group ("NYPIRG"), of $3 from his $53 mandatory

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[1] After the trial was concluded, but before an opinion had been rendered, defendants moved to dismiss on the ground that the action had become moot because plaintiff Michael McChesney, who at the time of trial had been a student in good standing at SUNY Albany, had subsequently been academically dismissed. According to SUNY Albany policy, a student who has been dismissed for academic reasons can apply for reinstatement at any time. Although McChesney has not yet applied for readmission, he may choose to do so, and it is reasonable to expect that he would then again raise the same claim which was fully litigated in the trial before me. Thus, I find that this claim is "capable of repetition yet evading review," *Honig v. Doe*, 484 U.S. 305, 318 (1988); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), and is not moot.

In addition to McChesney, Thomas Carroll, Robert Carroll, Craig Rucker, Emanuel Panos, Beth Turkovic, Edward Priola and Robert Schmidlin, former students at SUNY Albany who graduated before trial, are also named as plaintiffs and seek damages. The trial was bifurcated and only the injunctive claims of McChesney were tried. Plaintiff now moves to add three new plaintiffs, Christine McClellan, Christopher Sandor and Susanne Zeigler, all of whom are currently undergraduates at SUNY Albany and all of whom seek to raise the same core issue raised by McChesney and tried by this Court. Because these parties assert a right to relief arising out of the same transaction or occurrence out of which McChesney sues and involve the same questions of law and fact, plaintiff's request is granted. Fed.R.Civ.P. 20.

The named SUNY defendants are Donald Blinken in his capacity as Chairman of the Board of Trustees of the State University of New York; the individual members of the SUNY Board of Trustees in their capacity as trustees; D. Bruce Johnstone in his capacity as Chancellor of SUNY; and Vincent O'Leary in his capacity as President of SUNY Albany. Certain of the original named defendants who were sued in their official capacities ceased to hold office during the pendency of this action and have been succeeded by the current incumbent trustees and administrative officers of SUNY, pursuant to Fed.R.Civ.P. 25(d).

student activity fee payable each semester.[2] The total $53 fee funds a great number of student activities which, having first met SUNY's criteria under regulations adopted pursuant to New York's Education Law § 355,[3] are then voted on by the Student Association and must thereafter be approved and certified by the President of the University. Under the foregoing, a wide array of student groups receive funding including sporting clubs, language clubs, the Black Alliance, the Revisionist Zionist Alternative, the Feminist Alliance, the Pan-Carribean Association, Fuerza Latina, the Gay and Lesbian Alliance, and the Student Association of the State University.

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2 If the students approve payment of the student activity fee on a mandatory basis, every student is required to pay the fee for each term he or she is registered; failure to pay the mandatory student activity fee may result in denial of registration, unless it is determined that payment of the fee may cause a particular student undue hardship. § 302.14(c). During the relevant period, the SUNY Albany undergraduate student body voted to collect the student activity fee on a mandatory basis.

3 The regulation, 8 N.Y.C.R.R. § 302.14, requires that the allocations benefit the campus community and are consistent with the following criteria:

(i) programs of cultural and educational enrichment;

(ii) recreational and social activities;

(iii) tutorial programs

(iv) athletic programs, both intramural and intercollegiate;

(v) student publications and other media;

(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature; ...

NYPIRG,[4] which receives the questioned $3, is a New York not-for-profit corporation in whose activities some nineteen New York State University campuses participate and from whose campuses its Board of Directors -- all students -- come by student election. NYPIRG provides an opportunity for students to gain experience in citizenship and advocacy skills through research and active participation in public policy issues. It endeavors to identify and evaluate issues involving public decisions in New York State, conducts research on such issues, makes recommendations for public action, provides representation before governmental agencies, and seeks to promote reform through legislative and legal action. NYPIRG does not endorse or support campaigns for elective office. It operates through local chapters on the campuses of those State Universities which participate. NYPIRG's Board of Directors and its officers are all students, elected from the campuses at which a local NYPIRG chapter is a student organization and receives activity fee funding. Any activity fee-paying student at such a campus is eligible to run for election to the NYPIRG Board of Directors. In recent years, one or more students from SUNY Albany have been elected and served on the NYPIRG Board. Some students, participating in NYPIRG's activities, earn academic credit for their work; others participate in the activities on a volunteer basis. In addition to those students actively involved in organizing these various NYPIRG programs, others serve the student body by promoting speeches, debates, public forums, film shows, a used-book exchange service, newspaper recycling centers, conservation tips, and consumer service handbooks. SUNY Albany has had students who participated in a small claims court assistance clinic through which the students assisted community residents in court. Students at SUNY Albany have conducted surveys on the drinking age, proposed tuition hikes, comparative prices

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[4]NYPIRG is unusual in one respect in that since it involves other campuses, it is specifically voted upon by the student body at large of SUNY Albany every four years. It has always been approved.

of various products at area supermarkets, services available to rape victims, local beverage stores' compliance with the bottle return law, and local drug stores' compliance with generic drug legislation. They have prepared and disseminated reports on local bank practices and services, and local taxicab overcharge problems. They formed a project to improve campus lighting and other safety features. Other NYPIRG projects on which students from SUNY Albany work include research on the impact of toxic waste dumping, along with efforts to identify and clean up local sites near the campuses; voter registration drives; research and advocacy efforts concerning food irradiation; and research and advocacy efforts directed at government accountability and ethics. Students have researched issues including the statute of limitations in toxic exposure cases, the state's policy regarding its holdings in banks or companies doing business in South Africa, the transportation of nuclear waste, the rising costs of local utilities, the shortage of high-quality child care, the pending reauthorization of federal higher education costs, higher education financial aid programs, and various proposals to raise SUNY tuition, and the escalation of the arms race, all of which issues became the subject of NYPIRG-sponsored speeches, public forums and/or public debates on the public SUNY campus.

Each of these projects is selected annually by the NYPIRG Board of Directors, which, as observed earlier, consists wholly of students from the many local chapters throughout the state. Continuing projects are subject to annual reauthorization. In addition, any fee-paying student at a campus may advocate a proposal for a new project and submit it to the student Board of Directors for approval at any time. Each year the NYPIRG board specifically reviews and adopts a legislative program for the up-coming legislative session. The local and statewide projects and activities approved by the NYPIRG board involve students in numerous research, advocacy and public service matters of concern at the Albany

campus. Participating students in each area learn about their chosen project; prepare reports, memoranda and press releases; practice public survey techniques; involve themselves in community service efforts; obtain experience in public speaking; sponsor debates; and communicate with their legislative representatives.

It is clear from the testimony at the trial, whether the witness was the college president or a NYPIRG board member, that this experiential opportunity is regarded as a substantial educational benefit to students at SUNY Albany, and indeed, such would appear to be self-evident. On each campus, NYPIRG employs a legislative director. The director's responsibility at SUNY Albany, for example, is to train students in speaking, writing, research, organization and advocacy skills as well as exploring and advocating new project areas. Instruction in these projects is not only supervised by the campus directors, but also by NYPIRG's executive director, its student Board of Directors and its executive committee. The project creativity staff overseeing this operation is located in two statewide support offices, one in New York City and one in Albany. These offices and the campuses have some 60 paid full-time non-student staff,[5] who receive approximately 54% of NYPIRG's annual budget of around $2.7 million. Approximately 30% of this money comes

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[5]NYPIRG's publication "Agenda for Citizen Involvement" states their purpose as follows:

> NYPIRG's professional staff works to shape public policy and develop citizenship skills in the areas of consumer protection, government and corporate accountability, and economic and social justice. Some 15 of these are registered lobbyists who, among other things, lobby state legislators and governmental officials sometimes in company with and sometimes not, but only on behalf of positions taken by NYPIRG's student Board of Directors. NYPIRG's Board of Directors annually fashions a "Legislative Program."

from student activity fees, 45% from door-to-door canvassing, 15% from commissions on NYPIRG's fuel buyers groups, and 10% from grants.

Through the student activity fee, SUNY Albany, as has been pointed out, funds a wide array of student groups and has created a diverse forum for public discussion and debate on issues that affect our country. College campuses should, can and do play a vital role in promoting such debate and training undergraduates to become concerned, involved public citizens. By allocating a portion of the student activity fee to NYPIRG, SUNY Albany creates an opportunity for those students who so choose,[6] to enhance their civic awareness and skills. Simultaneously, by allocating funds to other student organizations, SUNY Albany encourages those students who do not choose to join NYPIRG to develop other skills or engage in activities which focus on other issues. The SUNY Albany administrators have determined that NYPIRG provides substantial educational opportunities for students, consistent with the criteria laid out in the State regulations, and that conclusion is well supported by the record.

Plaintiff argues that NYPIRG is a political action group[7] with only an incidental educational component and that the decision by the SUNY Albany trustees and administrators to permit funding of NYPIRG from the mandatory student

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[6]At SUNY Albany alone, some 60 students are regularly active at all times and some have been involved as legislative interns and directors. As observed, SUNY-Albany is but one of nineteen participating universities in New York State.

[7] Plaintiff obviously disagrees with some of the positions taken by his fellow undergraduates, but he is at liberty to participate in the annual decision-making (see below) and urge positions he wishes to espouse for an upcoming year. Thus, NYPIRG should be viewed not for the positions it in fact takes but -- as the administration sees it -- for the opportunity it gives students to take positions and then gain experience in pressing for them.

activity fee is not primarily or genuinely an academic decision. Testimony at trial belies plaintiff's claim. The fact that some of NYPIRG's activities involve issues of public policy does not diminish its educational value. The educational value lies in the participatory civics training obtained by the students who take advantage of this opportunity. The SUNY Albany administrators, having determined that a valuable part of an undergraduate education is gained through direct "hands on" involvement in civic activities, that determination is entitled to deference. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 263 (1957). This determination is the type of academic decision that is best left to administrators and trustees with expertise in designing college and university curriculum and extra-curricular activities.

Moreover, the freedom of the University to determine its educational mission, consistent with the professional judgment of those who guide it, is itself an interest which the First Amendment protects, particularly when that determination fosters debate on public issues. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). College campuses play a central role in providing an open forum for debate. *See*, *Widmar v. Vincent*, 454 U.S. 263, 267-68 n.5 (1981); *Healy v. James*, 408 U.S. 169, 180 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'"). By funding over 100 diverse student organizations, SUNY has established such a forum.

In analyzing plaintiff's First Amendment claim, plaintiff's individual interest in wishing not to contribute a portion of his mandatory fee to NYPIRG must be balanced against the University's interest in providing all students with the opportunity to engage in a wide range of activities and creating a forum for discussion. In addition to plaintiff's

interests, one must consider the rights of the large number of students who voted for, participate in, and support NYPIRG, as well as the right of the student body as a whole to receive information through the exchange of ideas. Where the State spends money to expand public debate, and does so on a content neutral basis,[8] the Constitution does not provide those individuals contributing to State funds control over the allocation of their contribution. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1979). Plaintiff's payment of the student activity fee, just like taxpayers' contributions to the government's general funds, may permissibly be used to fund political action and speech, despite some individuals' opposition to the views espoused through such action. *See Buckley* at 92-93; *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983).

In order to establish a First Amendment claim of compelled speech or association, plaintiff must demonstrate a close association between himself and the political speech with which he disagrees. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986). Absent a close identification, no First Amendment interest is implicated. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In *Barnette*, the Court struck down a school requirement compelling students to stand up and recite the pledge of allegiance. In *Wooley*, the Court found unconstitutional a state statute requiring an individual to publicly display a license plate motto that offended his religious beliefs. In *Pacific Gas & Electric*, the Court prohibited a requirement that the utility company

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[8] The University funds a wide range of organizations without considering what the groups' positions are on particular issues. NYPIRG, itself, exists to afford student the opportunity to take positions, whatever they may be. NYPIRG does not present students with fixed positions that the students must accept.

include political messages with which it disagreed in its billing envelopes. In each of these cases the objecting party was required to personally speak or carry a banner with which he disagreed. The connection between the objecting party and the objectionable speech was extremely close. In contrast, the SUNY Albany student who disagrees with a NYPIRG position is not himself compelled to speak out and voice NYPIRG's views, rather he is required only to contribute a fee to a general fund, out of which NYPIRG is but one group that is funded.[9] The connection between plaintiff and any one view or organization funded by the activity fee is attenuated. The fee supports over 100 diverse groups, and the contributions of the fee are paid by several thousand students. Thus, no close association exists between plaintiff and NYPIRG, and plaintiff's First Amendment rights are not infringed.[10]

In addition to the concern that an individual may be forced to utter an opinion with which he disagrees, compelled speech cases also raise the concern that an individual who wishes to remain silent may be forced to speak in order to counter a view with which he is unwillingly associated. For example, in *Pacific Gas & Electric*, the Court held that the obligation to include within its envelope a message with which the company disagreed constituted such a high degree of identification that the utility company might feel obliged to respond to the positions with which it disagreed in order to distance itself from those views. In contrast, because the activity fee is paid by thousands of students and supports over one hundred diverse groups, no risk arises that plaintiff will feel compelled to respond to the views of NYPIRG by

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[9] The fact that NYPIRG erroneously states in certain of its materials that it represents <u>all</u> students on its participating campuses, is not determinative on this issue.

[10] On plaintiff's theory, a student could unilaterally reduce his contribution to the student activity fund by a pro-rata deduction after determining all the organizations with whose goals he or she disagrees.

presenting counter viewpoints. If plaintiff is truly troubled he may obtain on demand a writing from NYPIRG making explicit his disassociation. Indeed, counter viewpoints are already present in the forum, espoused by those groups which do not share NYPIRG's positions. Plaintiff is free to remain silent and let others speak on the various sides of an issue or, alternatively, plaintiff may choose to join one of these other organizations. Yet another option available to plaintiff is to join NYPIRG himself and vote for it to take a stand on an issue which satisfies him.

This case is also distinguishable from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and its progeny, including *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and the recent *Lechnert v. Ferris Faculty Association*, __ U.S. __ , 111 S.Ct. 1950, 59 USLW 4544 (1991), upon which plaintiff relies. These cases address compulsory payments to unions where the funds are used in part to support political speech or action with which the objectors disagree. In the *Abood* line of cases, the Supreme Court permits mandatory payments to unions so long as those payments go toward activities related to the collective bargaining process - even if objectors disagree with those activities. However, the Court disallows the use of mandatory fees to support activities that are unrelated to the union's collective bargaining functions. The union cases are distinguishable from the present case for two principal reasons. First, in the union context, fees are paid to only one source - the union - which claims to speak in behalf of all the employees; a dissenting employee has no other mouthpiece through which he may make his opinion heard. In contrast, as stated above, on the SUNY Albany campus, the activity fee funds a forum created for the purpose of fostering the expression of diverse views through a wide range of groups, and plaintiff is not directly associated with NYPIRG or any other single group with which he disagrees. Secondly, in the

union cases, dues may permissibly be used only to fund activities which form the core purpose of the union, namely collective bargaining. Here, the student activity fee is being used by SUNY Albany precisely to further the University's core educational purpose of maintaining a broad extracurricular program and an open forum for discussion and debate. *See Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983).

Plaintiffs also cite *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), in which the Third Circuit struck down Rutgers' separate mandatory fee used to support the New Jersey Public Interest Research Group (NJPIRG). However, in *Galda*, the Court limited its analysis, stating, "We are not concerned here with the question whether an organization with PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views." 772 F.2d at 1064. This, slender though it is, distinguishes that case from the one before me, and I feel more applicable here is Judge Adams' dissent, in which he states that "the justification for compelling student fees in a university setting is found in the First Amendment itself, which protects a university's right to educate, and students' rights to be educated by exposure to diverse ideological viewpoints." 772 F.2d at 1073 n.7. Plaintiff, arguing the "least intrusive means" position, contends that the same civic training could be obtained by a student from fora and community activities operating locally and separately on each of the campuses involved. But obviously, none of these efforts could be as effective if NYPIRG worked only as a single-campus organization rather than, as currently constituted, with branches on several different campuses. Further, the experience gained by the students could not possibly be as meaningful, if the students merely engaged in play-acting, rather than becoming involved in actual research and advocacy efforts on real issues of public concern.

Accordingly, for the reasons stated above, I find that SUNY Albany's funding of NYPIRG through the allocation to it of $3 from plaintiff's mandatory student activity fee does not impermissibly infringe upon plaintiff's First Amendment rights. Plaintiff's claim for injunctive relief is accordingly denied and the action is dismissed. The foregoing constitutes the Court's findings of fact and conclusions of law and is so ordered.

July 30, 1991